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No. 76-1312

In the Supreme Court of the United States

OCTOBER TERM, 1976

CLAUDE C. WILD, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTION PRESENTED

Whether a prospective defendant in a federal criminal case may expressly waive the statute of limitations before expiration for his own benefit, after consultation with counsel, and with a full appreciation of the legal significance of the waiver.

STATUTORY PROVISION INVOLVED

2 U.S.C. § 455(a)(1975) provides in pertinent part:

> No person shall be prosecuted, tried or punished for any violation of . . . section . . . 610, . . . of Title 18, United States Code, unless the indictment is found or the information is instituted within 3 years after the date of the violation.

STATEMENT

On March 12, 1976, a grand jury empaneled in the District of Columbia returned a two-count indictment charging petitioner with making two corporate contributions in connection with federal elections in violation of 18 U.S.C. § 610.[1] After hearings on pre-trial motions the district court dismissed Count II of the indictment on the ground that it was barred by the statute of limitations. The court of appeals reversed in a thorough opinion (Pet. App.) on which we rely.

The facts are summarized in the opinion of the court below (Pet. App. 3a - 6a). Briefly, they show that, on November 13, 1973, following a Watergate Special Prosecution Force (WSPF) investigation, petitioner pleaded guilty to an information charging him with a single misdemeanor violation of 18 U.S.C. § 610 arising out of his activities as an officer of Gulf Oil Corporation. In 1975 the WSPF reopened its investigation and ultimately concluded petitioner had not disclosed all corporate contributions made by him to federal candidates during his first encounter with the WSPF in 1973.

In September, 1975, petitioner and his attorney, Leo T. Kissam, were notified of the investigation. On September 22, 1975, WSPF attorneys advised Kissam that they were prepared to seek the return of an indictment against petitioner charging him with three violations of 18 U.S.C. § 610, one of which arose out of an allegedly illegal contribution to the campaign of Senator Sam Nunn. Kissam was advised that the indictment

[1] 18 U.S.C. § 610 was repealed by Pub. L. 94-283, Title II, § 201(a), May 11, 1976, 90 Stat. 496. The substance of 18 U.S.C. § 610 is presently codified in 2 U.S.C. § 441b.

would be returned on September 26, 1975, one day before the expiration of the statute of limitations with regard to the Nunn contribution.

Kissam, who was primarily a civil attorney, decided that this matter should be handled by a criminal attorney, and on September 24, 1975, Kissam and petitioner met with Edward Bennett Williams. On the following day, Williams contacted a WSPF attorney to advise that he would be representing petitioner. Williams also stated that he realized that the statute of limitations would expire in two days, but that he wanted additional time to familiarize himself with the case and to explore with his client and the WSPF a possible disposition of the matter. In return, he proposed that petitioner sign a written waiver of the statute of limitations. The WSPF accepted the proposal, and the express waiver was signed by petitioner on September 26, 1975.[2]

[2] The text of this express waiver follows:

> I have been advised by your office [WSPF] that a federal grand jury is presently investigating my alleged involvement in the making of unlawful corporate campaign contributions by Gulf Oil Corporation and particularly my alleged involvement with respect to corporate contributions made in connection with the 1972 election campaign of Sam Nunn, a candidate for United States Senator from Georgia.
>
> In consideration of your office's delaying any final decision with respect to charging me with any criminal violations in connection with the alleged contribution to Sam Nunn's campaign, a delay requested by me for my benefit, I hereby waive all defenses grounded upon the applicable statute of limitations with respect to the Nunn transaction. I have discussed this matter with my attorney, Edward Bennett Williams, Esq., and I fully understand the consequences of this waiver.

Pet. App. 4a, n. 3.

Negotiations between the WSPF and petitioner and his counsel[3] ensued over the next four months, including proffers of testimony, office interviews and a grand jury appearance. On March 9, 1976, petitioner's attorney was advised that a two-count indictment against petitioner would be sought by the WSPF on March 12, 1976, and on that date petitioner was, in fact, indicted.

ARGUMENT

THE ISSUE OF WHETHER A STATUTE OF LIMITATIONS IN A FEDERAL CRIMINAL CASE MAY BE EXPRESSLY WAIVED BY A PROSPECTIVE DEFENDANT DOES NOT WARRANT REVIEW

Petitioner contends, in essence, that the decision of the court of appeals holding the statute of limitations to be a defense which he expressly waived is in conflict with the decisions of other federal courts. He further contends, in the alternative, that, even if the statute of limitations is a defense, to permit an express waiver of that defense would contravene public policy and legislative intent. His contentions are supported neither by the case law nor by the legislative purpose underlying the statute of limitations.

A. The decision of the court of appeals is consistent with relevant decisions of this Court as well as other authorities.

As the court of appeals noted, "[t]his is a case of first impression."[4] No other federal court has considered

[3]Mr. Williams' firm withdrew from representation of petitioner in November 1975, because of a potential conflict of interest. Petitioner then retained his present counsel, William G. Hundley.

[4]Pet. App. 2a.

the validity of an express waiver of the statute of limitations in a criminal case. Nonetheless, the decision of the court of appeals is entirely consistent with the opinions of this Court characterizing the federal statute of limitations as a defense, as well as the better-reasoned opinions of other courts of appeals.

In *United States v. Cook*, 84 U.S. 168, this Court held that the statute of limitations is not an element of the offense and, therefore, that a demurrer to an indictment would not lie, even where the indictment on its face alleges commission of the offense at a date outside the applicable period of limitations. Implicit in this holding, as the court of appeals noted (Pet. App. 7a), is the conclusion that the statute represents a defense which the defendant must assert and not an aspect of the court's jurisdiction which may be noticed at any stage in the proceedings. Similarly, in *Biddinger* v. *Comm'r of Police*, 245 U.S. 128, an appeal from the denial of a habeas petition, this Court had before it the issue of whether the appellant was entitled in the trial court to introduce evidence that the crime for which he was being extradited had occurred beyond the period of the statute of limitations and that he was not a fugitive from justice. In affirming the lower court, Mr. Justice Clarke, citing *Cook*, stated:

> The statute of limitations is a defense and must be asserted on the trial by the defendant in criminal cases. . . .

245 U.S. at 135.

Extrapolating from these holdings, the Court of Appeals for the Second Circuit has held that a plea of guilty precluded the defendant's argument on appeal that his prosecution was barred either by the Sixth

Amendment's requirement of a speedy trial or by the applicable statute of limitations. *United States* v. *Doyle*, 348 F. 2d 715 (C.A. 2) (Friendly, J.), *certiorari denied*, 382 U.S. 843. *Accord*, *United States* v. *Parrino*, 212 F. 2d 919, 922 (C.A. 2), *certiorari denied*, 348 U.S. 840. *Cf.*, *United States* v. *Kenner*, 354 F. 2d 780, 785 (C.A. 2), *certiorari denied*, 383 U.S. 958. ("The defense of the statute of limitations must be raised before or during the trial."). *See also*, *United States* v. *Ferri*, 546 F. 2d 419 (C.A. 3), *certiorari denied*, _____ U.S. _____ (45 U.S.L.W. 3667, April 4, 1977).[5]

Only the Court of Appeals for the Tenth Circuit[6] has held the statute of limitations to be jurisdictional. *Waters* v. *United States*, 328 F. 2d 739 (C.A. 10), involved the issue of whether a six-year statute of limitations was applicable to a substantive violation of the Internal Revenue Code,[7] the defendant apparently having raised for the first time on appeal the defense of the three-year

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[5]Several other federal courts have denied relief where the issue of the statute of limitations was raised for the first time on appeal or by collateral attack. *Forthoffer* v. *Swope*, 103 F. 2d 707, 709 (C.A. 9) ("The defense [of the statute of limitations] . . . cannot be considered on appeal where not urged in the trial court . . . and appealable matters may not be considered on petition for writ of habeas corpus."); *Capone* v. *Aderhold*, 65 F. 2d 130, 131 (C.A. 5) ("In some, perhaps most, of the states an indictment is fatally defective which shows on its face that it was returned after the running of the statute of limitations. However, in the federal courts the bar of the statute is a matter of defense . . .);" *Johnson* v. *United States*, 13 Fed. Cas. 867, 868 (No. 7418) (C.C.D. Mich.) ("The court had jurisdiction of the offense, and if there was a bar under the statute, it should have been pleaded . . . . By failing to set up the defence, the defendant waived it.").

[6]One district court has so ruled. *United States* v. *Harris*, 133 F. Supp. 796 (W.D. Mo.).

[7]26 U.S.C. § 5851.

statute.[8] In holding the six-year period inapplicable, the court *sua sponte* addressed the issue of whether the statute of limitations had been timely asserted, and held that, because the statute is jurisdictional, it could be raised for the first time on appeal.

The *Waters* court itself acknowledged[9] that its findings with respect to the statute of limitations were inconsistent with its own prior decisions and with *United States* v. *Cook*, *supra*, and the court below properly rejected its reasoning. (Pet. App. 10a).[10]

The other case principally relied on by petitioner, *Benes* v. *United States*, 276 F. 2d 99 (C.A. 6), does not formally address the issue of whether the statute of limitations may be expressly waived. In *Benes*, the prosecutor and the defendant's counsel agreed that the prosecutor would not present certain evidence to the grand jury until disposition of defendant's appeal from a district court order which dissolved an earlier injunction against that presentation. Subsequent to the agreement but prior to the return of the indictment, the statute of limitations expired. There is no indication whatsoever that the defendant, his counsel, or the prosecutor contemplated a waiver of the state of limitations. Defendant raised the defense of the statute at trial and again on appeal. The court of appeals quite properly held the prosecution to be

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[8]26 U.S.C. § 6531. The charging instrument, on its face, indicated that it was filed more than three years after the date of the offense.

[9]328 F. 2d at 743.

[10]Two leading commentators on the Federal Rules of Criminal Procedure agree that the statute of limitations is a defense which is waived if not raised at trial. 1 C. Wright, *Federal Practice and Procedure* § 193 at 409-10 (1969); 8 *Moore's Federal Practice* § 12.03[1], at 12-17, 18 (2d ed. 1976).

barred. Only in *dictum* did the court state that an agreement between the prosecutor and the defendant will not waive the statute of limitations defense.

B. Express waiver of the statute of limitations contravenes neither public policy nor the intent of Congress.

Petitioner's contention that, even if the statute of limitations is a defense, express waiver of that defense would be violative of public policy and the legislative purpose underlying the statute is without foundation.

This Court has explicitly recognized the role played by plea negotiations in the criminal justice system, *Santobello* v. *New York*, 404 U.S. 257, 260, and in order for such negotiations to be carried on effectively, both parties must act in good faith. Where a prospective defendant, advised by counsel, determines that it is in his best interests to engage in plea discussions and elects to waive a defense afforded for his personal protection, the courts should recognize the validity of that determination. As the court of appeals found (Pet. App. 12a), nothing in the purposes to be served by the statute of limitations—that is, to avoid the hazards of prosecution grounded on evidence obscured by the passage of time, to limit exposure for acts committed in the distant past, and to encourage expeditious investigation of suspected criminal activity—militates in favor of the result petitioner seeks. See *Toussie* v. *United States*, 397 U.S. 112, 114-115. Indeed if the judgment of the district court were upheld, never again would a prosecutor be able to afford to a prospective defendant the opportunity to avoid the cost and strain of indictment, for he would be

unable to rely on even the most informed waiver as part of the negotiation process.[11]

Beyond this, petitioner's contention ignores the fact that a wide variety of rights arising out of the Constitution may be waived so long as the waiver is knowing and intelligent.[12] Surely if rights of constitutional dimension may be waived, no public policy demands a contrary result in this case.

Petitioner's assertion that an express waiver of the defense of the statute of limitations contravenes the legislative intent is not supportable. The staff of the Senate Committee on the Judiciary, in commenting on the statute of limitations as proposed in the Criminal Justice Reform Act of 1975, wrote:

> The classification of the statute of limitations defense as a "bar to prosecution" (which term is defined . . . [to mean a ground for terminating a prosecution in favor of a defendant that must be raised as prescribed by Rule 12 of the Federal Rules of Criminal Procedure]) is intended, in the main, to continue existing law which, with a single minor exception, requires the defense to be raised either before or during the trial. A failure to assert the

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[11]Nor, if the statute were held to be jurisdictional, would a defendant be permitted, as part of the plea negotiating process, to plead to a lesser offense barred by the statute of limitations in exchange for the dismissal of more serious charges not so barred—a course permitted under the holding in *United States* v. *Doyle*, *supra*.

[12]*United States* v. *Calabro*, 467 F. 2d 973 (C.A. 2), *certiorari denied*, 410 U.S. 926 (right to counsel); *United States* v. *Scott*, 464 F. 2d 832 (C.A. D.C.)(right not to be placed in jeopardy twice for the same offense); *Beatty* v. *United States*, 377 F. 2d 181 (C.A. 5), *rev'd on other grounds*, 389 U.S. 45 (right to trial by jury).

> claim timely constitutes a waiver thereof so that the contention may not be first asserted on appeal or on collateral attack of a conviction. This principle applies both to pleas of guilty or nolo contendere and to other trials. [Footnotes omitted.]

Staff of Senate Comm. on the Judiciary, 94th Cong., 1st Sess., *Report to Accompany S.1* (Comm. Print 1975), p. 86.

Again, if failure to raise the defense of the statute of limitations in timely fashion, either through negligence or inadvertance, constitutes a waiver of the defense, then an express waiver, made on the advice of counsel, with full knowledge of its legal consequences, cannot be contrary to public policy or legislative intent.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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